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2 **UNITED STATES DISTRICT COURT**  
3 **DISTRICT OF NEVADA**  
4

5 MARK ROGERS,

6 Petitioner,

7 v.

8 WILLIAM GITTERE, et al.,

9 Respondents.

Case No. 3:02-cv-00342-GMN-WGC

**ORDER**

10  
11 Introduction

12 This case is a petition for a writ of habeas corpus by Mark Rogers, a Nevada  
13 prisoner. The case is before the court with respect to the merits of certain claims  
14 remanded by the Court of Appeals for further consideration by this Court. The Court will  
15 grant Rogers habeas corpus relief on one of the remanded claims, Rogers' claim that  
16 his trial counsel rendered ineffective assistance of counsel with respect to their  
17 investigation and presentation of his defense of not guilty by reason of insanity.

18 Background Facts and Procedural History

19 In its September 3, 1985, decision affirming Rogers' convictions and sentence,  
20 the Nevada Supreme Court described, as follows, the facts of the case as revealed by  
21 the evidence:

22 On December 3, 1980, Frank and Linda Strode returned from a  
23 Thanksgiving trip to their home in an isolated part of Pershing County near  
Majuba Mountain, where they resided with Frank's parents, Emery and

1 Mary Strode, and Frank's sister, Meriam Strode Treadwell. When they  
2 entered the parents' trailer, they found the dead bodies of Emery, Mary  
3 and Meriam under a blanket in a bedroom. Emery had been shot three  
4 times and stabbed twice with a knife which was left in his chest. A pocket  
5 watch discovered in Emery's shirt pocket had been struck by one of the  
6 bullets; the hour hand of the watch was stopped at one o'clock. Mary had  
7 been stabbed in the back and shot in the chest. Meriam, whose wrists  
8 were bound with an electric cord, died from a single gunshot wound in her  
9 back. Emery and Meriam kept daily diaries. The last entry in both diaries  
10 was recorded on the morning of December 2, 1980.

11 On December 1, 1980, between 4:30 and 5 p.m., Robert Schott  
12 gave defendant a ride from Winnemucca to Imlay. As soon as Rogers  
13 climbed into Schott's truck, he looked nervously in both the back of the  
14 truck and the rear view mirror. Defendant introduced himself as John and  
15 claimed that he was a musician going to Reno to look for a job. At one  
16 point during the drive, defendant blurted out: "You may not believe it but I  
17 am a good American. You may not believe it but I'm on your side. I would  
18 fight for my country."

19 On December 2, 1980, between approximately 12:15 and 12:45  
20 p.m., David Hartshorn, a geologist working at the Majuba Hill Mine,  
21 observed Rogers standing alongside a road near Majuba Canyon and  
22 offered him a ride. During the ride, Hartshorn gave defendant a can of  
23 Seven-Up to drink. Defendant stated that "[s]omebody is shooting rockets  
... and one of these days it will hit my pyramid and blow me up." Rogers  
alighted at the Strode residence with the Seven-Up can in hand.

Between 12:30 and 2 p.m. that same day, Ray Horn, a mechanic at  
a nearby mine, was driving on a county road near Majuba Mountain. As he  
passed a dark metallic blue truck, a slender young man driving the truck  
shot at Horn several times. Between 3:30 and 4 p.m., Earl L. Smith, a  
highway maintenance worker saw Rogers standing on a road between  
Denio and Winnemucca and provided him a ride because defendant had  
run out of gasoline. Rogers was later observed traveling at an extremely  
high rate of speed in a blue truck, which was identified by its license  
number as the Strodes' truck.

On December 5, 1980, Rogers was refused entry into Canada. In  
conversing with a Canadian police officer, Rogers indicated that he was  
the King of North America. On January 4, 1981, defendant was arrested in  
Florida when he was seen riding on the bumper of a car, holding on to a  
luggage rack. After he was arrested, Rogers told police that God knew him  
and that we were all a part of mother nature. During fingerprinting,  
defendant refused to speak and wrote on a piece of paper that he

1 belonged to the government. Later at the jail, defendant claimed that he  
2 had killed the Strode family in self-defense.

3 Rogers' fingerprints were lifted from various items in the Strode  
4 residence, including a Seven-Up can and a glass jar found in the bedroom  
5 under the blanket with the victims' bodies. At trial, the defense presented  
6 the testimony of several expert witnesses which indicated defendant was  
7 a paranoid schizophrenic at the time of evaluation and that defendant's  
8 behavior at the time of the commission of the crimes was consistent with  
9 psychotic paranoid delusions, schizophrenia and psychosis and that  
10 Rogers could not tell right from wrong or the nature and quality of his acts.  
11 One psychologist believed that defendant, who was trained in acting, was  
12 faking his symptoms. After finding the defendant guilty of the crimes  
13 charged, the jury imposed the death penalty for the three murder  
14 convictions, and prison terms for the attempted murder and grand larceny.

15 *Rogers v. State*, 101 Nev. 457, 461-62, 705 P.2d 664, 667-68 (1985), *cert. denied*, 476  
16 U.S. 1130 (1986).

17 Rogers appealed, and the Nevada Supreme Court affirmed his conviction and  
18 sentence on September 3, 1985. *Rogers*, 101 Nev. 457, 705 P.2d 664 (1985). The  
19 United States Supreme Court denied Rogers' petition for a writ of certiorari. *Rogers v.*  
20 *Nevada*, 476 U.S. 1130 (1986).

21 On February 26, 1986, Rogers filed a petition for post-conviction relief in the  
22 state district court. That court held an evidentiary hearing, at which Rogers testified,  
23 and then, on September 29, 1986, denied the petition. Rogers appealed, and on  
June 20, 1987, the Nevada Supreme Court dismissed the appeal.

On October 26, 1987, Rogers filed a petition for a writ of habeas corpus in this  
Court, initiating the case of *Rogers v. Whitley*, 3:87-cv-0505-ECR. Counsel was  
appointed to represent Rogers. On July 27, 1989, the court stayed that action so that  
Rogers could exhaust certain claims in state court.

1 On October 15, 1990, Rogers filed, in state court, a second petition for post-  
2 conviction relief, and on December 24, 1991, that petition was denied. Rogers  
3 appealed, and the Nevada Supreme Court dismissed the appeal on May 28, 1993.

4 On December 1, 1993, Rogers filed a second federal habeas corpus action in  
5 this Court: *Rogers v. Angelone*, 3:93-cv-0785-ECR. Rogers' first federal habeas action  
6 was then dismissed. The petition in Rogers' second federal habeas action was  
7 amended and supplemented, and Respondents answered. On March 6, 1997, the Court  
8 ordered the action dismissed, without prejudice, in order to permit Rogers to further  
9 exhaust claims in state court.

10 On March 24, 1997, Rogers filed, in state district court, a third petition for post-  
11 conviction relief. The state district court dismissed that petition, Rogers appealed, and  
12 the Nevada Supreme Court affirmed on May 13, 2002.

13 On June 25, 2002, Rogers initiated this, his third, federal habeas action, by filing  
14 a "renewed" petition for writ of habeas corpus (ECF No. 11).

15 On November 24, 2004, Rogers moved for a stay of these proceedings, under  
16 *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803 (9th Cir.), *cert. denied*, 540 U.S. 1069  
17 (2003), contending that he was not competent to proceed with this action (ECF No. 39).  
18 On September 21 and 22, 2005, the court held an evidentiary hearing on that motion  
19 (ECF Nos. 60, 61). The Court denied the motion on October 24, 2005 (ECF No. 58) and  
20 denied a motion to reconsider on May 18, 2006 (ECF No. 69).

21 On December 14, 2006, Rogers filed a first amended petition (ECF No. 75), and  
22 on December 19, 2006, he filed a second amended petition (ECF No. 77), which is the  
23 operative petition in the action.

1 On August 10, 2007, Respondents filed a motion to dismiss (ECF No. 85). The  
2 Court ruled on Respondents' motion to dismiss on March 24, 2008, granting it in part  
3 and denying it in part. See Order entered March 24, 2008 (ECF No. 108). In that order,  
4 the Court dismissed Grounds 1, 2, 4, 8, 12, 14, 15, 16, 17, 18, 22, 25, 26, 27, 28, 29,  
5 30, 31, 32, 33, 34, 35, 36, and 37 of Rogers' second amended petition. In addition, the  
6 Court found Ground 7 to be unexhausted, and Rogers abandoned that claim on  
7 April 24, 2008 (ECF No. 109).

8 After Respondents answered Rogers' remaining claims, and the parties briefed  
9 those claims, the Court ruled on the claims on July 8, 2011, granting Rogers' petition in  
10 part and denying it in part. See Order entered July 8, 2011 (ECF No. 145). The Court  
11 denied Rogers relief with respect to Grounds 3, 5, 6, 9, 10, 11, 13, 19, 24, and 38 of his  
12 second amended petition. The Court granted Rogers relief with respect to Grounds 20,  
13 21, and 23, concerning Rogers' death sentence, and ordered that Rogers be granted a  
14 new penalty-phase trial or that his death sentence be vacated and a non-capital  
15 sentence imposed.

16 Respondents appealed and Rogers cross-appealed (ECF Nos. 147, 149). The  
17 Ninth Circuit Court of Appeals ruled on July 16, 2015. See Opinion of Court of Appeals  
18 (ECF No. 162), published as *Rogers v. McDaniel*, 793 F.3d 1036 (2015). The Court of  
19 Appeals affirmed the grant of habeas corpus relief regarding Rogers' death sentence.  
20 However, the appellate court remanded the case for further consideration of certain of  
21 Rogers' claims regarding the guilt phase of his trial, in light of potentially relevant cases  
22 decided while the case was on appeal. See *Rogers*, 793 F.3d at 1044-45. Regarding  
23 the remanded claims, the Court of Appeals stated:

1 Turning to Rogers's many uncertified guilt-phase claims, we  
2 expand Rogers's COA, vacate the district court's denials of relief and  
3 remand for further proceedings, because the district court did not have the  
4 benefit of many potentially relevant cases decided while Rogers's appeal  
5 was pending. See *Murray v. Schriro*, 745 F.3d 984, 1002 (9th Cir. 2014)  
6 (holding that we may issue a COA if jurists of reason could debate the  
correctness of district court's procedural ruling or whether petitioner has  
been denied a constitutional right). [Footnote: Our grant of partial habeas  
corpus relief moots Rogers's numerous penalty-phase claims, which we  
do not address.] It is appropriate that the district court address the  
significance, if any, of those new precedents in the first instance.

7 The district court held that several of Rogers's claims were  
8 procedurally barred, and dismissed them. After that order, the Supreme  
Court decided *Martinez v. Ryan*, [566 U.S. 1], 132 S.Ct. 1309 (2012), and  
9 we have applied *Martinez* in several cases, including *Ha Van Nguyen v.*  
10 *Curry*, 736 F.3d 1287, 1296 (9th Cir. 2013), *Detrich v. Ryan*, 740 F.3d  
11 1237 (9th Cir. 2013) (en banc), and *Pizzuto v. Ramirez*, 783 F.3d 1171,  
12 1176-78 (9th Cir. 2015). We expand the COA as to Claims 12, 14, 15, 16,  
13 17, 18, 26, and 28, vacate the district court's dismissal of these claims,  
14 and remand them for consideration of *Martinez* and our decisions  
15 interpreting it. On remand, the district court should consider whether these  
claims are claims of ineffective assistance of trial or direct appeal counsel  
cognizable under *Martinez*, and whether Rogers can show cause and  
prejudice to excuse his procedural default. [Footnote: Rogers also  
challenges the sufficiency of the state procedural default rule applied in his  
case. We decline at this time to address that sufficiency issue. Rogers  
may raise this challenge again in a later appeal, if not rendered moot by  
proceedings on remand.]

16 The district court also denied several claims on the merits, refusing  
17 under *Cullen v. Pinholster*, [563 U.S. 170,] 131 S. Ct. 1388 (2011), to  
consider new evidence Rogers presented in support of his federal habeas  
18 petition. We expand the COA as to Claims 5, 9, and 10, vacate the district  
court's denial of these claims, and remand for the district court to consider  
19 our subsequent decision in *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir.  
20 2014) (en banc), as well as the decisions in *Martinez*, *Ha Van Nguyen*,  
*Detrich*, and *Pizzuto*.

21 Finally, the district court determined that several of Rogers's claims  
were barred by AEDPA's one-year statute of limitations, 28 U.S.C.  
22 § 2244(d)(1), and that Rogers was not entitled to equitable tolling on those  
claims. While Rogers's case was pending on appeal, we decided *Sossa v.*  
23 *Diaz*, 729 F.3d 1225 (9th Cir. 2014). We expand the COA as to Rogers's  
Claims 1, 2, and 8, vacate the district court's dismissal of those claims,

1 and remand to the district court to consider whether, in light of *Sossa*,  
2 Rogers is entitled to equitable tolling on those claims. If the district court  
3 concludes that equitable tolling is appropriate, it should consider in the first  
4 instance whether Rogers can show good cause for a stay and abeyance  
5 procedure under *Rhines v. Weber*, 544 U.S. 269 (2005). See *Blake v.*  
*Baker*, 745 F.3d 977, 984 (9th Cir.), *cert. denied*, 135 S. Ct. 128 (2014)  
(holding that a petitioner who showed ineffective assistance of counsel in  
initial post-conviction review proceedings had shown “good cause” for a  
stay and abeyance).

6 *Id.*

7 This Court then ordered the parties to file briefs stating their positions regarding  
8 the issues to be resolved on remand (ECF No. 167). Following that briefing, on  
9 March 2, 2017, the Court determined that the dismissal of Grounds 1, 2 and 8, as  
10 barred by the statute of limitations, was unaffected by the subsequent decision in  
11 *Sossa*; consequently, the Court again dismissed those claims (ECF No. 200). The Court  
12 determined, further, that an answer or supplemental answer was warranted with respect  
13 to Grounds 5, 9, 10, 12, 14, 15, 16, 17, 18, 26, and 28, and the Court set a schedule for  
14 Respondents’ answer and Rogers’ reply.

15 Respondents filed their answer, responding to Rogers’ remaining claims, on  
16 May 18, 2017 (ECF No. 203). On June 7, 2017, Rogers filed a reply (ECF No. 205),  
17 along with a motion for evidentiary hearing (ECF No. 204). On July 7, 2017,  
18 Respondents filed a supplement to their answer (ECF No. 212). See Order entered  
19 July 11, 2017 (ECF No. 213) (granting Respondents leave of court to file supplement to  
20 answer). And, on August 9, 2017, Respondents filed a response to Rogers’ reply to their  
21 answer (ECF No. 214).

22 In an order entered November 6, 2017, the Court dismissed Grounds 9, 10, 12,  
23 14, 15, 17, 26 and 28, and all the claims in Grounds 16 and 18 other than claims of

1 ineffective assistance of trial counsel, on procedural default grounds, determining that  
2 *Martinez* and *Dickens* do not affect that outcome. See Order entered November 6, 2017  
3 (ECF No. 215).

4 In the November 6, 2017, order, the Court granted Rogers an evidentiary hearing  
5 on Ground 5. See *id.* Rogers filed a pre-hearing brief on August 8, 2018 (ECF No. 233),  
6 and an amended pre-hearing brief on August 9, 2018 (ECF No. 237). Respondents filed  
7 a pre-hearing brief on August 23, 2018 (ECF No. 242). Rogers filed a reply pre-hearing  
8 brief on August 30, 2018 (ECF No. 244). The Court granted Rogers leave to conduct  
9 certain pre-hearing discovery. See Order entered July 6, 2018 (ECF No. 228); Order  
10 entered August 28, 2018 (ECF No. 243). The evidentiary hearing was held on  
11 October 22, 23, and 24, 2018. See Minutes of Proceedings (ECF Nos. 269, 270, 272);  
12 Transcripts of Evidentiary Hearing (ECF Nos. 275, 276, 277). Following the evidentiary  
13 hearing, on December 21, 2018, Rogers filed a post-hearing brief (ECF No. 278).  
14 Respondents filed a post-hearing brief on January 30, 2019 (ECF No. 282). Rogers filed  
15 a reply post-hearing brief on February 13, 2019 (ECF No. 284).

16 Rogers' claim in Ground 5 and his claims of ineffective assistance of trial counsel  
17 in Grounds 16 and 18 are now before the Court for resolution on their merits.

#### 18 Ground 5

19 In Ground 5, Rogers claims that his federal constitutional rights were violated as  
20 a result of ineffective assistance of counsel because his trial counsel failed to  
21 adequately investigate his mental health and failed to consult with mental health  
22 experts, in order to properly present his defense of not guilty by reason of insanity  
23 (NGRI). See Second Amended Petition (ECF No. 77), pp. 105-17.

1 In his first state habeas action, Rogers asserted a claim that his trial counsel was  
2 ineffective with respect to his NGRI defense. In that claim, Rogers focused on his  
3 counsel's decision to call his mother as a witness and his counsel's alleged failure to  
4 properly prepare expert witnesses but did not cite to or present any evidence from  
5 outside the record. Later, in his third state habeas action, Rogers asserted, in state  
6 court, a more substantial claim, again similar to that in Ground 5, but that petition was  
7 ruled procedurally barred.

8 When this Court ruled on the claim in Ground 5 in the July 8, 2011, order, the  
9 Court, applying the law as it was at that time, looked only at the evidence presented in  
10 support of the claim in Rogers' first state habeas action, and denied the claim. See  
11 Order entered July 8, 2011 (ECF No. 145), pp. 12-14. The Ninth Circuit Court of  
12 Appeals reversed that ruling, and remanded the claim for reconsideration in light of  
13 *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir.  
14 2014) (en banc), both of which were decided after this Court's ruling. See *Rogers*, 793  
15 F.3d at 1044-45. In *Dickens*, the court of appeals held that a claim has not been fairly  
16 presented in state court, and may be procedurally defaulted, if new factual allegations  
17 asserted in federal court fundamentally alter the claim as compared to the claim as  
18 considered by the state courts. *Dickens*, 740 F.3d at 1318. In *Martinez*, the Supreme  
19 Court held that lack of counsel, or ineffective assistance of counsel, in an initial state  
20 postconviction proceeding, may function as cause, to overcome a procedural default of  
21 a claim of ineffective assistance of trial counsel. *Martinez*, 566 U.S. at 18.

22 So, the first question to be resolved regarding Ground 5 is whether new  
23 allegations and evidence – that is, the allegations and evidence presented now, in this

1 case, but not presented in Rogers' first state habeas action – fundamentally alter the  
2 claim. If so, and if this claim as presented here would now be procedurally barred in  
3 state court (see NRS §§ 34.726, 34.800, 34.810; 28 U.S.C. § 2254(b)(1)(B)(i);  
4 *Woodford v. Ngo*, 548 U.S. 81, 92-93 (2006)), and is therefore subject to the procedural  
5 default doctrine, the question becomes whether Rogers can overcome the procedural  
6 default. See Order entered November 6, 2017 (ECF No. 215), p. 6.

7 “A claim has not been fairly presented in state court if new factual allegations  
8 either ‘fundamentally alter the legal claim already considered by the state courts,’ ... or  
9 ‘place the case in a significantly different and stronger evidentiary posture than it was  
10 when the state courts considered it.’” *Dickens*, 740 F.3d at 1318 (quoting *Vasquez v.*  
11 *Hillery*, 474 U.S. 254, 260 (1986); *Beaty v. Stewart*, 303 F.3d 975, 989-90 (9th Cir.  
12 2002); *Aiken v. Spalding*, 841 F.2d 881, 883 (9th Cir. 1988); and citing *Nevius v.*  
13 *Sumner*, 852 F.2d 463, 470 (9th Cir. 1988)). In this Court's view, without question, the  
14 new allegations and evidence presented by Rogers in this case fundamentally alter the  
15 claim as compared to its presentation in Rogers' first habeas action in state court. The  
16 new evidence -- in particular the testimony of Rogers' expert witnesses at the  
17 evidentiary hearing in this Court -- places the claim in a significantly different and  
18 stronger evidentiary posture than in state court, where Rogers' presented no evidence  
19 from outside the trial court record to support the claim. Therefore, Ground 5 is subject to  
20 the procedural default doctrine, and is barred by that doctrine unless Rogers can  
21 overcome the procedural default. See Petitioner's Closing Brief (ECF No. 278), p. 28  
22 (“The evidence and allegations outlined above are procedurally defaulted. Mr. Rogers  
23 can overcome that default....”).

1 In *Coleman v. Thompson*, the Supreme Court held that a state prisoner who fails  
2 to comply with the state's procedural requirements in presenting his claims is barred by  
3 the adequate and independent state ground doctrine from obtaining a writ of habeas  
4 corpus in federal court. *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991) ("Just as in  
5 those cases in which a state prisoner fails to exhaust state remedies, a habeas  
6 petitioner who has failed to meet the State's procedural requirements for presenting his  
7 federal claims has deprived the state courts of an opportunity to address those claims in  
8 the first instance."). Where such a procedural default constitutes an adequate and  
9 independent state ground for denial of habeas corpus, the default may be excused only  
10 if "a constitutional violation has probably resulted in the conviction of one who is actually  
11 innocent," or if the prisoner demonstrates cause for the default and prejudice resulting  
12 from it. *Murray v. Carrier*, 477 U.S. 478, 496 (1986). To demonstrate cause for a  
13 procedural default, the petitioner must "show that some objective factor external to the  
14 defense impeded" his efforts to comply with the state procedural rule. *Murray*, 477 U.S.  
15 at 488. For cause to exist, the external impediment must have prevented the petitioner  
16 from raising the claim. See *McCleskey v. Zant*, 499 U.S. 467, 497 (1991). With respect  
17 to the prejudice prong, the petitioner bears "the burden of showing not merely that the  
18 errors [complained of] constituted a possibility of prejudice, but that they worked to his  
19 actual and substantial disadvantage, infecting his entire [proceeding] with errors of  
20 constitutional dimension." *White v. Lewis*, 874 F.2d 599, 603 (9th Cir. 1989), citing  
21 *United States v. Frady*, 456 U.S. 152, 170 (1982).

22 In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Supreme Court ruled that ineffective  
23 assistance of post-conviction counsel may serve as cause to overcome the procedural

1 default of a claim of ineffective assistance of trial counsel. The *Coleman* Court had held  
2 that the absence or ineffective assistance of state post-conviction counsel generally  
3 could not establish cause to excuse a procedural default because there is no  
4 constitutional right to counsel in state post-conviction proceedings. See *Coleman*, 501  
5 U.S. at 752-54. In *Martinez*, however, the Supreme Court established an equitable  
6 exception to that rule, holding that the absence or ineffective assistance of counsel at  
7 an initial-review collateral proceeding may establish cause to excuse a petitioner's  
8 procedural default of substantial claims of ineffective assistance of trial counsel. See  
9 *Martinez*, 566 U.S. at 9. The Court described "initial-review collateral proceedings" as  
10 "collateral proceedings which provide the first occasion to raise a claim of ineffective  
11 assistance at trial." *Id.* at 8. Accordingly, under the equitable rule of *Martinez*, a habeas  
12 petitioner may establish cause for the procedural default of an ineffective assistance of  
13 trial counsel claim "where the state ... required the petitioner to raise that claim in  
14 collateral proceedings, by demonstrating two things: (1) 'counsel in the initial-review  
15 collateral proceeding, where the claim should have been raised, was ineffective under  
16 the standards of [*Strickland*]' and (2) 'the underlying ineffective-assistance-of-trial-  
17 counsel claim is a substantial one, which is to say that the prisoner must demonstrate  
18 that the claim has some merit.'" *Cook v. Ryan*, 688 F.3d 598, 607 (9th Cir. 2012)  
19 (quoting *Martinez*, 566 U.S. at 14); see also Respondents' Closing Brief (ECF No. 282),  
20 pp. 8-10 (agreeing that, if the claim in Ground 5 is fundamentally altered, *Martinez*  
21 applies, and the claim may be adjudicated on its merits if Rogers shows that his initial  
22 state post-conviction counsel provided ineffective assistance with respect to the claim).

1 In *Strickland*, the Supreme Court propounded a two-prong test for analysis of  
2 claims of ineffective assistance of counsel: the petitioner must demonstrate (1) that the  
3 attorney's representation "fell below an objective standard of reasonableness," and  
4 (2) that the attorney's deficient performance prejudiced the defendant such that "there is  
5 a reasonable probability that, but for counsel's unprofessional errors, the result of the  
6 proceeding would have been different." *Strickland*, 466 U.S. at 688, 694. A court  
7 considering a claim of ineffective assistance of counsel must apply a "strong  
8 presumption" that counsel's representation was within the "wide range" of reasonable  
9 professional assistance. *Id.* at 689. The petitioner's burden is to show "that counsel  
10 made errors so serious that counsel was not functioning as the 'counsel' guaranteed the  
11 defendant by the Sixth Amendment." *Id.* at 687. And, to establish prejudice under  
12 *Strickland*, it is not enough for the habeas petitioner "to show that the errors had some  
13 conceivable effect on the outcome of the proceeding." *Id.* at 693. Rather, the errors  
14 must be "so serious as to deprive the defendant of a fair trial, a trial whose result is  
15 reliable." *Id.* at 687.

16 Rogers' initial state post-conviction counsel presented, in a *pro forma* manner, a  
17 claim asserting that Rogers' trial counsel was ineffective with respect to their handling of  
18 Rogers' NGRI defense. After Rogers filed a three-page *pro se* petition, initiating his first  
19 state habeas action, his appointed counsel filed a four-and-a-half-page supplemental  
20 petition. See Petition, ECF No. 77-6, pp. 497-500; Supplemental Petition, ECF No. 77-6,  
21 pp. 501-06. In the supplemental petition, the claim regarding trial counsel's presentation  
22 of his NGRI defense was presented, in its entirety, as follows:  
23

1 Trial counsel for Petitioner called Petitioner's mother as a witness  
2 during the guilt phase contrary to Petitioner's expressed direction to not do  
3 so. Her testimony was devastating to Petitioner and counsel's doing so  
4 violated Petitioner's right to effective assistance of counsel.

5 Petitioner was denied effective assistance of counsel in presenting  
6 an insanity defense in that defense counsel presented the testimony of  
7 Dr. Rich who stated that it would be difficult for him to determine the  
8 mental status of Petitioner at the time of the offenses as he was not  
9 present there and had no facts or history just prior to the testimony of  
10 Dr. Pauly, who testified that he could make such a determination. (ROA,  
11 pp. 1025; 1050).

12 Supplemental Petition, ECF No. 77-6, p. 504. Rogers' state post-conviction counsel:  
13 did not seek to develop evidence to support the claim; failed to do any investigation;  
14 failed to meaningfully interview trial counsel; failed to consult experts regarding Rogers'  
15 mental state at the time of the killings; failed to present testimony of experts regarding  
16 that issue; failed to interview trial witnesses; failed to obtain records from Lake's  
17 Crossing Center for the Mentally Disordered Offender (Lake's Crossing), an institution  
18 where Rogers was housed and where his competence to stand trial was assessed;  
19 failed to interview Rogers' family or friends; and even failed to obtain and examine the  
20 entire trial record. See Deposition of Mary E. Boetsch, ECF No. 77-3, pp. 773-922.  
21 The state district court held a hearing on Rogers' petition, and Rogers' counsel called  
22 one witness: Rogers. See Transcript of Proceedings, September 22, 1986, ECF Nos.  
23 122-2, 122-3. By its nature -- raising the question of Rogers' mental condition at the  
time of the crimes -- the claim was one that plainly called for investigation and  
evidentiary support from outside the trial court record, including expert witness opinions,  
but Rogers' counsel wholly failed to competently articulate the claim and develop and  
present evidence to support it. In contrast, in this federal habeas action, Rogers points

1 out numerous aspects of trial counsel's deficient performance, not pointed out in  
2 Rogers' first state habeas action. And, in this case, Rogers supports the claim with  
3 evidence not presented in state court, including the complete trial court record, Rogers'  
4 daily progress records from Lake's Crossing, police reports, evaluations of Rogers by  
5 mental health experts prior to his trial, declarations from relatives and friends of Rogers,  
6 testimony of trial counsel, testimony of mental health experts, and testimony of a  
7 *Strickland* expert. The evidence Rogers presents in this case, that was not presented in  
8 state court, places this claim in a completely different light, shows that Rogers' state  
9 post-conviction counsel's performance was inadequate, and substantiates his claim that  
10 his trial counsel were ineffective with respect to their handling of his NGRI defense. The  
11 Court determines that Rogers' initial state post-conviction counsel's presentation of this  
12 claim in state court fell below an objective standard of reasonableness, and Rogers was  
13 prejudiced thereby. And, as is discussed below, Rogers' claim is substantial. Under  
14 *Martinez*, Rogers shows cause and prejudice, such as to overcome the procedural  
15 default of Ground 5.

16 Because this claim, as now presented, was not adjudicated on its merits in state  
17 court, this Court's review of the claim is *de novo*. See *Cone v. Bell*, 556 U.S. 449, 472  
18 (2009); *Porter v. McCollum*, 558 U.S. 30, 39 (2009). The standard of review imposed by  
19 28 U.S.C. § 2254(d) does not apply.

20 Rogers' trial counsel, Virginia Shane and Robert Bork, of the Nevada State  
21 Public Defender's Office (NSPD), settled on an NGRI defense immediately upon their  
22 appointment to represent Rogers in January 1981. Testimony of Virginia Shane at  
23

1 Evidentiary Hearing, ECF No. 275, p. 25; Testimony of Robert Bork at Evidentiary  
2 Hearing, ECF No. 276, p. 14.

3       However, when the trial commenced, Shane neglected, in her opening  
4 statement, to prepare the jury to consider Rogers' NGRI defense. Though the  
5 prosecutor informed the jury that Rogers had pled not guilty by reason of insanity and  
6 that Rogers had the burden to prove that he was legally insane at the time he  
7 committed the crimes (see State's Opening Statement, ECF No. 138-12, pp. 30-31),  
8 Shane did not explain to the jury what had to be proven and would be proven to  
9 establish legal insanity. See Defendant's Opening Statement, ECF No. 138-12, p. 32 -  
10 ECF No. 138-13, p. 1. Shane discussed certain evidence that she expected the State to  
11 present, which she felt revealed Rogers' mental state, for example, that he was  
12 "paranoid" and "irrational," but she did not tell the jury what the legal standard was for  
13 the NGRI defense. See *id.* And, only to confuse matters, at the end of her opening  
14 statement, Shane told the jury that Rogers did not act with intent, malice, or  
15 premeditation, suggesting that was point of her discussion of Rogers' mental state,  
16 rather than an NGRI defense. See *id.*, ECF No. 138-13, p. 1. Essentially, when Shane  
17 was done with her opening statement, a reasonable juror would have had no idea what  
18 the requirements were for Rogers' NGRI defense and would have no idea what to look  
19 for in that regard in the evidence. When asked about her opening statement at the  
20 evidentiary hearing in this case, Shane testified as follows:

21           Q.     In your opening statement, did you define for the jury the  
22           standard for legal insanity?

23           A.     I did not. I neglected to do that.

1 Q. Did you know what the standard was at the time that you  
2 gave openings?

3 A. Yes. I knew that the *McNaughten* Rule was the rule that  
4 applied in the State of Nevada as well as other – most other states, and  
that was whether he knew what he was doing and knew the difference  
between right and wrong.

5 Q. Do you remember a reason why you didn't share that with  
6 the jury during opening?

7 A. I think it was a big mistake. I don't recall why I didn't.

8 Testimony of Virginia Shane at Evidentiary Hearing, ECF No. 275, p. 58. Further, at the  
9 evidentiary hearing in this case, Rogers presented expert testimony of Martin Wiener, a  
10 Nevada criminal defense attorney with extensive experience, including experience  
11 defending capital murder cases and experience presenting NGRI defenses. Wiener was  
12 knowledgeable regarding the standard of practice in such cases in Nevada in 1981, and  
13 he testified as follows regarding Rogers' trial counsel's opening statement:

14 Q. And, in your opinion, did trial counsel's opening statement  
15 satisfy the standard of practice?

16 A. No.

17 Q. Why not?

18 A. Well, it was going to be tough to prevail on the defense that  
19 Mark Rogers didn't commit these offenses. There was strong  
20 circumstantial evidence that he committed those offenses. So, the  
21 possibility of avoiding a guilty verdict all fell on the insanity defense. And  
22 yet, in Ms. Shane's opening statement, she never mentions the insanity  
23 defense. She never discusses the definition of insanity that was going to  
be presented to the jury at the end of the trial, so they must have  
wondered why are we listening to all this stuff about is it paranoid  
schizophrenia or is it antisocial behavior or did he malingering or didn't he,  
did he fake, didn't he? Why are we listening to psychiatrists?

1           So, it was essential to educate the jury why they were going to  
2 listen to this testimony, and it would have been quite effective if – because  
3 the standard of practice is to lay out the case you're going to present to  
4 the jury. You educate them about the law that's going to be presented to  
5 them. You educate them about the facts they are going to hear, and there  
6 was no discussion of what all these psychiatrists were going to talk about  
7 and what the conclusion was. Besides, what did it matter if the guy was  
8 acting crazy? I mean, the jury didn't find out until shortly before they were  
9 going to make a decision on this case why they had listened to all this  
10 psychiatric stuff, you know, because that was the first time the insanity  
11 test, the potential insanity verdict was ever discussed. The Judge did say  
12 the Defendant pleaded not guilty by reason of insanity, but what does that  
13 mean? So, it was a completely inept opening argument. It didn't look to  
14 the jury like the insanity defense was an issue in the case until the closing  
15 arguments, and even that wasn't argued very well. So, yes, it was far  
16 below the standard of practice for the one possibility of a not guilty verdict.

17           Q.     In your opinion, was there a valid strategic reason for failing  
18 to define insanity to the jury during opening statements?

19           A.     Absolutely not.

20           Testimony of Martin Weiner at Evidentiary Hearing, ECF No. 276, pp. 236-38. The Court  
21 finds that Rogers' trial counsel's performance, in failing to explain the NGRI defense to  
22 the jury in her opening statement, fell below an objective standard of reasonableness.

23           Furthermore, despite the fact that numerous mental health professionals had  
24 evaluated Rogers at Lake's Crossing, Rogers' counsel only asked one expert to opine  
25 on the question of Rogers' sanity at the time of the crimes, and counsel did not do that  
26 until October 1981, less than two weeks before the trial commenced. See Testimony of  
27 Dr. Pauly at Evidentiary Hearing, ECF 276, pp. 60-64. The one doctor that Rogers' trial  
28 counsel called to testify regarding Rogers' sanity at the time of the crimes was  
29 Dr. Ira Pauly. Dr. Pauly concluded that Rogers was schizophrenic and at the time of the  
30 crimes was incapable of knowing the nature and quality of his acts or that his acts were  
31 wrong. See Trial Testimony of Dr. Pauly at Evidentiary Hearing, ECF No. 234-1, p. 23 –

1 ECF No. 234-3, p. 26. However, because he had not been properly prepared for his  
2 testimony, Dr. Pauly was subject to unnecessarily damaging cross-examination. See *id.*  
3 at ECF No. 234-2, p. 26 – 234-3, p. 23. For example, on cross-examination, Dr. Pauly  
4 testified: that he had not read the Lake's Crossing daily progress notes regarding  
5 Rogers; that he had not been informed about a conversation Rogers had with a witness  
6 on December 1, 1989, the day before the offenses; that he did not know that  
7 Dr. Richnak had been misled by Rogers' regarding Rogers' memory; and that he did not  
8 know what information came from the State and what information came from the  
9 defense investigator. See *id.*, ECF No. 234-3, pp. 4-5, 7, 10-11, 15. Dr. Pauly was not  
10 properly prepared for his testimony because Rogers' trial counsel never met with him in  
11 person, never discussed with him the materials he relied upon in reaching his opinions,  
12 never discussed with him reports from Lake's Crossing psychologist Martin Gutride that  
13 contradicted his conclusions, never provided him the Lake's Crossing daily progress  
14 notes, and never discussed with him how Rogers' violent behavior during his  
15 adolescence was related to his schizophrenia. See Testimony of Dr. Pauly at  
16 Evidentiary Hearing, ECF No. 276, pp. 90-91, 99, 101, 104-08, 113-14. Asked if she  
17 provided Lake's Crossing daily progress notes to Dr. Pauly, Shane testified:

18       You know, I don't know why I wouldn't have. However, at trial, he said that  
19       he had not received those from me. So if I failed to do that, it was  
      definitely a mistake on my part. I thought I had and I evidently had not.

20 Testimony of Virginia Shane at Evidentiary Hearing, ECF No. 275, p. 90. In short, the  
21 evidence at the evidentiary hearing showed that Rogers' counsel did not adequately  
22 prepare Dr. Pauly – the defense's most important witness -- for his trial testimony.

1 In addition to Dr. Pauly, Rogers' trial counsel chose as testifying experts  
2 Dr. Louis Richnak and Dr. Phillip Rich, two psychiatrists whom the trial court had  
3 appointed to evaluate Rogers' competence to stand trial. See Testimony of Virginia  
4 Shane at Evidentiary Hearing, ECF No. 275, pp. 68-71, 81-82, 85. Rogers' trial counsel  
5 did not retain Drs. Richnak and Rich to testify on the critical issue in the case, Rogers'  
6 sanity at the time of the crimes, and did not provide them with the information they  
7 would have needed to form an opinion on that issue and did not discuss that issue with  
8 them at all. Rather, trial counsel retained Drs. Richnak and Rich to testify only that they  
9 diagnosed Rogers as suffering from schizophrenia. *Id.* And, trial counsel admitted at the  
10 evidentiary hearing that she could not remember doing anything at all to prepare  
11 Dr. Richnak or Dr. Rich to testify. *Id.* at 67, 69, 70, 72, 77 ("I don't recall discussing  
12 anything with Dr. Richnak."), 78, 84 ("I don't recall preparing [Dr. Rich], no."). As a result  
13 of trial counsel's narrow use of Drs. Richnak and Rich and her failure to prepare them  
14 for their testimony, when the prosecutor asked Drs. Richnak and Rich on cross-  
15 examination for their opinions regarding Rogers' sanity at the time of the crimes --  
16 without any objection from Rogers' counsel -- both said they believed Rogers to know  
17 right from wrong when they examined him, but both were unable to render any opinion  
18 as to his sanity at the time of the crimes. See Trial Testimony of Dr. Richnak, ECF No.  
19 139-10, pp. 4-5, 8-10; Trial Testimony of Dr. Rich, ECF No. 234-1, pp. 13, 20-21. This  
20 testimony by Drs. Richnak and Rich, under cross-examination, contrasted sharply with  
21 the testimony of Dr. Pauly, who opined that Rogers was not sane when he committed  
22 the crimes.

1 The Court finds that Rogers' trial counsel performed unreasonably in not  
2 adequately preparing Dr. Pauly, Dr Richnak and Dr. Rich to testify at trial. See *Smith v.*  
3 *Stewart*, 189 F.3d 1004, 1012 (9th Cir. 1999) ("A lawyer who should have known but  
4 does not inform his expert witnesses about essential information going to the heart of  
5 the defendant's case for mitigation does not function as 'counsel' under the Sixth  
6 Amendment."); *Wallace v. Stewart*, 184 F.3d 1112, 1118 (9th Cir. 1999) (ineffective  
7 assistance of counsel may be shown where trial counsel do not fulfill "duty to seek out  
8 [evidence concerning defendant's background] and bring it to the attention of the  
9 experts"); *Caro v. Calderon*, 165 F.3d 1223, 1228 (9th Cir. 1999) (trial counsel may be  
10 ineffective where he "failed to provide those who did examine [the defendant] with the  
11 information that he had"); *Bean v. Calderon*, 163 F.3d 1073, 1080 (9th Cir. 1998)  
12 (Ineffective assistance of trial counsel "resulted from inadequacies in rudimentary trial  
13 preparation and presentation: providing experts with requested information, performing  
14 recommended testing, conducting an adequate investigation, and preparing witnesses  
15 for trial testimony. These were not alien concepts in 1981, but were an integral thread in  
16 the fabric of constitutionally effective representation."). Regarding Dr. Pauly, this failure  
17 exposed him to damaging cross-examination, unnecessarily undermining his testimony.  
18 Regarding Dr. Richnak and Dr. Rich, this failure left them unable to opine whether  
19 Rogers was insane at the time he committed the offenses. Weiner testified at the  
20 evidentiary hearing that "if [trial counsel] had given [Drs. Richnak and Rich] all the  
21 reports, they would have been prepared to testify" and "the only reason [Drs. Richnak  
22 and Rich] couldn't express an opinion [on Rogers' sanity at the time of the offenses]  
23 was their only source of a possible opinion would have been from what Mr. Rogers told

1 them. But there was abundant other material available that didn't require Mr. Rogers to  
2 say anything about the event." Testimony of Martin Wiener at Evidentiary Hearing, ECF  
3 No. 276, p. 226; see also Testimony of Virginia Shane at Evidentiary Hearing, ECF No.  
4 275, pp. 85-86 (recalling no reason why she did not ask Dr. Rich about his opinion as to  
5 whether Rogers was sane at the time of the offenses). Wiener testified, further,  
6 regarding the effect of this failure on the part of trial counsel:

7           Q.     Mr. Wiener, I believe you mentioned somewhere in there  
8           that Drs. Rich and Richnak had testified that they couldn't give an opinion  
9           on his mental state due to his failure to discuss it. In your opinion, did this  
10          testimony from Drs. Rich and Richnak that they couldn't give that opinion  
11          undermine Dr. Pauly's later testimony that he could?

12          A.     I think absolutely. The standard of practice would not be to  
13          put on a witness who, at the most, was neutral in terms of what they would  
14          provide to the jury, but would be harmful when compared or when the juror  
15          would have some comparison between their testimony and Dr. Pauly's.  
16          They undermined Dr. Pauly's credibility because what they were basically  
17          saying is, it was impossible to reach an opinion about the mental state of  
18          Mark Rogers at the time of the event. And Dr. Pauly was testifying it was  
19          possible and he had an opinion.

20                 And so, the fact that two competent psychiatrists couldn't render an  
21                 opinion could very easily be misunderstood because of a lack of  
22                 background information, could very well be misunderstood to undermine  
23                 the fact that Dr. Pauly had an opinion and these two psychiatrists didn't.  
24                 So, what's the value of Pauly's opinion if he's so isolated in his  
25                 conclusions?

26 Testimony of Martin Wiener at Evidentiary Hearing, ECF No. 276, pp. 227-28.

27 Indeed, the trial judge commented on this in the presence of the jury. After Rogers' trial  
28 counsel's direct examination of Dr. Richnak went on for some time, the trial judge  
29 interrupted, and the following exchange occurred:

30                 THE COURT: Well, I think we are at the point, Mrs. Shane, that we  
31                 need to ask this witness that the defendant is accused of committing five  
32                 separate offenses on December 2nd, 1980, and describe hypothetically  
33                 the offenses.

1 what the facts have been shown to this jury and we need to know if this  
2 man has an opinion on that date what the mental condition or capacity  
was of Mark Rogers.

3 MRS. SHANE: Your Honor, --

4 THE COURT: He can state if he does have an opinion and he can  
5 state what it is and tell us why he has that opinion and you can go into his  
examination and reports.

6 But, we are not getting anywhere at this point.

7 MRS. SHANE: Your Honor, Dr. Richnak was not appointed to  
8 address that issue. His issue is strictly competency.

9 THE COURT: Then why are we going into it? We have spent over  
a half hour and he doesn't have an opinion on the December 2nd, 1980?

10 Trial Testimony of Dr. Richnak, ECF No. 139-9, pp. 28-29. Then, after Shane told the  
11 judge that Dr. Pauly would testify on that issue, the prosecutor objected to Dr. Richnak's  
12 further testimony as having "no bearing on the issue," and the trial judge told Rogers'  
13 trial counsel she needed to present evidence of insanity at the time of the crimes,  
14 because the defense raised that issue. *Id.* at 29. Rogers' trial counsel then explained  
15 that Dr. Pauly would testify on the insanity issue, not Dr. Richnak or Dr. Rich. *Id.* at 29-  
16 30. But then, inexplicably, when the prosecutor, in his cross-examinations, asked  
17 Drs. Richnak and Rich their opinions regarding the insanity issue, Rogers' trial counsel  
18 failed to object, and both Dr. Richnak and Dr. Rich testified that they could not state an  
19 opinion on that issue. See Trial Testimony of Dr. Richnak, ECF No. 139-10, pp. 4-5, 8-  
20 10; Trial Testimony of Dr. Rich, ECF No. 234-1, pp. 13, 20-21. It was apparently  
21 obvious to the trial court -- as it is obvious to this Court now -- that Rogers' trial  
22 counsel's presentation of Drs. Richnak and Rich, unprepared to offer opinions as to  
23 Rogers' sanity at the time of the offenses, was mostly pointless, and worse, it was

1 damaging to Rogers' NGRI defense, as the inability of Drs. Richnak and Rich to state  
2 opinions on the issue of Rogers' sanity at the time of the crimes contradicted the  
3 testimony of Dr. Pauly, who did state an opinion on that issue. The Court finds that the  
4 performance of Rogers' trial counsel fell below an objective standard of reasonableness  
5 in this regard.

6 An expert that was an obvious choice to present at trial, but whom trial counsel  
7 did not present, was Dr. Donald Molde. The trial court appointed Dr. Molde in  
8 January 1981 to assess Rogers' competence to stand trial *as well as his mental state at*  
9 *the time of the crimes*. Testimony of Virginia Shane at Evidentiary Hearing, ECF No.  
10 275, p. 30. Dr. Molde was the first to evaluate Rogers; he evaluated Rogers no less  
11 than five times and concluded that Rogers was schizophrenic. Testimony of Dr. Molde  
12 at Evidentiary Hearing, ECF No. 276, pp. 146, 154. However, despite the scope of  
13 Dr. Molde's appointment, and his extensive knowledge regarding Rogers' condition, the  
14 evidence indicates that trial counsel *never even spoke with Dr. Molde*. See Testimony of  
15 Virginia Shane at Evidentiary Hearing, ECF No. 275, p. 38; Testimony of Robert Bork at  
16 Evidentiary Hearing, ECF No. 276, p. 33; Testimony of Dr. Molde at Evidentiary  
17 Hearing, ECF No. 276, pp. 166, 176, 178-79 ("My recollection, I've never spoken ever  
18 with them."). Shane testified as follows regarding this failure:

19 Q. Did you ever ask Dr. Molde what his opinion was on NGRI  
20 before trial?

21 A. Dr. Molde?

22 Q. Correct.

23 A. No.

1 Q. Do you remember why?

2 A. I dropped the ball. I mean, he was there. He was already  
3 paid by the court. I should have brought him in because his opinion was  
4 consistent. His was that he was paranoid schizophrenia of a substantial  
degree and, in fact, he had reviewed everything that the court had asked  
him to review.

5 Testimony of Virginia Shane at Evidentiary Hearing, ECF No. 275, p. 94; see *also id.* at  
6 93-94 ("I made a big mistake."). Trial counsel's failure in this regard was especially  
7 egregious given that Dr. Molde had recently testified in support of an insanity defense  
8 presented by attorneys from the NSPD, and his potential value to Rogers' defense  
9 should have been well known to Rogers' counsel. See Testimony of Martin Wiener at  
10 Evidentiary Hearing, ECF No. 276, pp. 209-11. It is plain from Dr. Molde's testimony at  
11 the evidentiary hearing in this case that he would have been an effective expert witness  
12 in support of Rogers' NGRI defense. See, e.g., Testimony of Dr. Molde at Evidentiary  
13 Hearing, ECF No. 276, pp. 160-62 (Dr. Molde disagreed with Dr. Gutride's opinion that  
14 Rogers was malingering.); pp.167-74 (Dr. Molde saw many indications of schizophrenia  
15 in records regarding Rogers and diagnosed Rogers as schizophrenic.); 174-75  
16 (Dr. Molde disagreed with Dr. Gutride's diagnosis of ASPD – "[I]t has nothing to do with  
17 this case."); 175 (Dr. Molde believed diagnoses of schizophrenia and ASPD to be  
18 mutually exclusive.); 183-84 (Dr. Molde believed the culture among the staff at Lake's  
19 Crossing contributed to improper and premature judgments and diagnoses.) And, at the  
20 evidentiary hearing, Dr. Molde testified as follows on the most important issue, the issue  
21 of Rogers' sanity at the time of the crimes:

22 Q. Did you reach an opinion as to Mr. Rogers' mental state at  
23 the time of the offense?

1           A.       Yes. I believe that he was not – I believe that he did not  
2 know right from wrong or know the nature and quality of his act, that he  
3 was not competent at the time of the crime to know those things due to his  
schizophrenic disorder which I believe was quite active and intense and  
interfered with that ability.

4           Q.       And what do you base that opinion on?

5           A.       Well, the totality of the record. Including heavily leaning upon  
6 the accounts and witnesses who saw him and interacted with him  
immediately before and immediately after the crime, the time of the crime,  
7 and the preceding information from Mr. Morrison and others that I think  
clearly establish the onset date, the onset of when his condition began, all  
8 of which is quite consistent with what we know about the condition. So all  
of that information, what I was able to see in and around the time of the  
9 crime, and then of course since then the persistent, relentless continuation  
of his mental status abnormalities that have persisted to the present day.  
10 So that all to me is just a rock-solid case.

11          Q.       Is it possible for someone to suffer from schizophrenia and  
still understand the nature and quality of her actions?

12          A.       Yes.

13          Q.       And so why do you think that Mr. Rogers did not understand  
14 the nature and quality of his actions at the time of the offense?

15          A.       I think they're – because he had – some of the symptoms he  
16 had, in my experience, are ... signs and symptoms of the most active state  
of schizophrenia. The intense delusional activity that he had all the way  
17 from thinking he was God and the king, and owning land, and the FBI was  
after him, and all of that sort of thing to his odd verbal comments, to the  
hieroglyphics and the pyramid stuff, and all of that, including his muteness,  
18 the posturing that he did when I first – all of that to me are the most  
intense – signs of the most intense presence of the disease, if you will.  
19 And so that's why I believe that he was not competent. That all of those  
things, to me, indicate that he was in an acute phase of the illness when  
20 everything was its most intense and at its highest level. And he had  
enough of all of that to clearly indicate that he had some pretty strange  
21 ideas and, therefore, in my opinion, was not competent to clearly know  
what he was doing.

22                   \*    \*    \*

23          Q.       Did trial counsel ever ask you to testify at trial?

1 A. No.

2 Q. If they had called you, would you have agreed to testify in  
3 1981 that Mr. Rogers was insane at the time of the offense?

4 A. I'm quite sure I would have. Although I would have probably  
5 needed to look at some more records. But, yes, if they had called and  
6 asked from me to see if I could render that opinion, I certainly would have  
7 considered it, yes.

8 *Id.* at 180-82. Wiener testified as follows regarding trial counsel's failure to take  
9 advantage of the trial court's appointment of Dr. Molde to render an opinion regarding  
10 Rogers' sanity at the time of the crimes:

11 Q. -- and in your opinion, did their failure to take advantage of  
12 that order fall below the standard of practice at the time in 1981?

13 A. Yes. And I have a reason for that opinion, but I'll --

14 Q. What was the reason?

15 A. -- well, I think there were multiple reasons. One of them  
16 showed up in the trial transcript itself, that at Mr. Rogers' trial the  
17 prosecutor's closing argument tried to discredit Dr. Pauly's testimony not  
18 only by saying it was the only, you know, psychiatrist out of 11 or 12 who  
19 actually testified about insanity and yet, Dr. Pauly's report and his opinion  
20 here is that his diagnosis of paranoid schizophrenia inevitably led to a  
21 determination that the insanity test was met.

22 And so, this sort of statistical attack on Dr. Pauly would really have  
23 been helped by having a second psychiatrist testify about whether -- about  
the -- the mental state of Mr. Rogers. And we heard from Dr. Molde that he  
would have testified in that way. That's what his report and his testimony  
says to me. He would have been a second psychiatrist testifying on the  
issue of insanity, finding that the insanity test was met by Mr. Rogers. So,  
now you have two psychiatrists instead of one.

Further, the closing argument of the prosecutor was that Dr. Pauly  
was a hired gun. Hired gun because he was allegedly being paid by the  
Public Defender's Office. Of course, we know he wasn't. He was paid by  
the county, but he was chosen by the Public Defender's Office so that was

1 used to further discredit his testimony. Whereas, if Dr. Molde had testified,  
2 they couldn't say that about him because not only was he being paid by  
the county, but he was also chosen by the Judge.

3 So, those were a couple of the reasons why it was just a  
4 squandering of available resources that could have made a big difference  
in this case if Dr. Molde had been used as a defense witness on the issue  
5 of insanity.

6 Q. And, in your opinion, again, having reviewed the transcripts  
and listened to the testimony of the witnesses, was there a valid strategic  
7 reason for trial counsel's failure to consult with Dr. Molde?

8 A. None. None that I could possibly imagine.

9 Testimony of Martin Weiner at Evidentiary Hearing, ECF No. 276, pp. 223-24; *see also*  
10 *id.*, ECF No. 277, pp. 17-19. In this Court's view, trial counsel plainly performed  
11 unreasonably in not acting upon the trial court's appointment of Dr. Molde to render an  
12 opinion as to Rogers' sanity at the time of the offenses, in not ascertaining Molde's  
13 opinion on that issue, and in not preparing him, and calling him, to testify at trial.

14 Rogers' trial counsel also failed to adequately investigate Rogers' background in  
15 order to fully prepare defense expert witnesses to testify, and the Court finds that  
16 counsel's performance in this regard was objectively unreasonable as well. Trial  
17 counsel knew that the prosecution's theory was that Rogers was an actor, was not  
18 severely mentally ill, and was malingering, and counsel knew that Rogers' background  
19 was an important factor in the diagnosis of him as schizophrenic. See Testimony of  
20 Virginia Shane at Evidentiary Hearing, ECF No. 275, pp. 50-51, 55-56. But, despite  
21 knowing the importance of Rogers' background, trial counsel did not investigate his  
22 childhood. *Id.* at 55. After exhausting their initial funding for their investigation, trial  
23 counsel sought funding for further investigation, but only for investigation related to the

1 penalty phase of the trial, and that was denied as premature. *Id.* at 42-44, 56-57.  
2 Moreover, trial counsel did not seek help from an in-house investigator available at the  
3 NSPD office, where they were employed. *Id.* at 44. Consequently, trial counsel  
4 proceeded to trial without the ability to provide their experts with important information  
5 about Rogers' background and without any opportunity to discuss such information with  
6 their experts to prepare them to testify. *See, e.g.,* Testimony of Dr. Pauly at Evidentiary  
7 Hearing, ECF No. 276, pp. 99-101.

8         The State's expert witness at trial was Dr. Martin Gutride, a psychologist at  
9 Lake's Crossing. Dr. Gutride testified that, in his opinion, Rogers was not schizophrenic  
10 or otherwise severely mentally ill, but rather had an antisocial personality disorder  
11 (ASPD). *See* Trial Testimony of Dr. Gutride, ECF No. 234-4, pp. 8-9. Dr. Gutride also  
12 testified that he believed Rogers was malingering -- that is, faking symptoms of  
13 schizophrenia. *See id.* at 9-12. Furthermore, Dr. Gutride testified that Dr. Richnak had  
14 told him that he, Dr. Richnak, had been fooled for a time by Rogers about Rogers'  
15 memory, buttressing the notion that Rogers was an actor who was able to falsely  
16 convince people that he was schizophrenic. *See id.* at 11. Dr. Gutride also questioned  
17 the ability of experts to determine Rogers' sanity at the time of the offenses. *See id.* at  
18 6-8. The Court finds that Rogers' trial counsel unreasonably failed to challenge the  
19 testimony of Dr. Gutride. *See Harris ex rel. Ramseyer v. Wood*, 64 F.3d 1432, 1438  
20 (9th Cir. 1995) (trial counsel ineffective, in part, for failing to challenge prosecution  
21 expert). During her cross-examination of Dr. Gutride, Shane: failed to point out  
22 that Dr. Gutride lacked sufficient information to diagnose ASPD; failed to point out  
23

1 that a diagnosis of schizophrenia would preempt a diagnosis of ASPD; failed to  
2 effectively confront Dr. Gutride with information that supported a schizophrenia  
3 diagnosis rather than an ASPD diagnosis; failed to effectively confront Dr. Gutride with  
4 information that undermined his opinion that Rogers was malingering; and failed to point  
5 out inconsistencies in Dr. Gutride's own reports. See *id.* at 12-23. Rogers' trial counsel  
6 also failed to offer affirmative testimony from Rogers' own experts to undermine  
7 Dr. Gutride's testimony. Wiener testified that "any reasonable defense attorney at that  
8 time would have anticipated Dr. Gutride [was] going to be called by the prosecution"  
9 based on Dr. Gutride's reports, his testimony at the competency hearing, and the  
10 prosecutor's questioning of Dr. Richnak. See Testimony of Martin Wiener at Evidentiary  
11 Hearing, ECF No. 276, p. 232. Wiener continued: "So, Dr. Gutride totally escaped  
12 because of a lack of preparation by the defense counsel, and the standard of practice is  
13 you've got to figure out where the prosecution is going to come at you and get ready for  
14 that." *Id.* at 233. Dr. Gutride's opinions were questionable and should have been  
15 challenged more fully and competently. It is well accepted, and was in 1981, that a  
16 diagnosis of schizophrenia precludes a diagnosis of ASPD, and there was a plethora of  
17 evidence available, already in the trial record when Dr. Gutride testified, supporting a  
18 schizophrenia diagnosis. Furthermore, there was strong evidence available to cast  
19 doubt on Dr. Gutride's opinion that Rogers was malingering; for example, there was  
20 evidence that Rogers exhibited obvious signs of schizophrenia before the crimes were  
21 committed. Trial counsel had available the DSM-III, Dr. Gutride's reports, police reports,  
22 and reports from multiple psychiatrists who disagreed with Dr. Gutride's opinions, but  
23 she failed to use those materials to effectively cross-examine Dr. Gutride. As Wiener

1 testified: “[T]here’s an obligation to go seek that kind of evidence, but it was all there in  
2 front of the defense counsel and it wasn’t used.” Testimony of Martin Wiener at  
3 Evidentiary Hearing, ECF No. 276, p. 235. Furthermore, Rogers’ trial counsel could  
4 have, but did not, prepare defense experts to point out inconsistencies in Dr. Gutride’s  
5 reports, to show that his ASPD diagnosis was not in line with DSM-III requirements, and  
6 to explain that the ASPD diagnosis was precluded by the stronger schizophrenia  
7 diagnosis, and she stated no strategic reason for not doing so. See *id.* at 232-34; see  
8 also Testimony of Virginia Shane at Evidentiary Hearing, ECF No. 275, pp. 77-78, 80.  
9 At the evidentiary hearing, Shane acknowledged that Dr. Gutride’s report was “very bad  
10 for our defense,” but admitted that she simply was not prepared for his testimony. See  
11 *id.* at 73, 76, 84, 95 (“I didn’t have trial preparation for him.”).

12 Both of Rogers’ trial attorneys, Shane and Bork, were relatively inexperienced  
13 and had heavy caseloads. Shane graduated from law school in the spring of 1980, took  
14 the Nevada bar exam in July of 1980, and was assigned to represent Rogers in this  
15 capital triple-murder case in January of 1981. See Testimony of Virginia Shane at  
16 Evidentiary Hearing, ECF No. 275, pp. 13-14, 18-19, 24-27. Bork had been a lawyer for  
17 about four years at the time of Rogers’ trial, had only worked at the NSPD for two years,  
18 and had never defended a capital case. See Testimony of Robert Bork at Evidentiary  
19 Hearing, ECF No. 276, pp. 7-11. While handling Rogers’ case, Shane and Bork both  
20 carried caseloads of more than eighty cases. See Testimony of Virginia Shane at  
21 Evidentiary Hearing, ECF No. 275, pp. 16-17, 28; Testimony of Robert Bork at  
22 Evidentiary Hearing, ECF No. 276, p. 10. Neither had ever presented an NGRI defense.  
23 See Testimony of Virginia Shane at Evidentiary Hearing, ECF No. 275, p. 27; Testimony

1 of Robert Bork at Evidentiary Hearing, ECF No. 276, pp. 11, 14. At the evidentiary  
2 hearing, Wiener concluded that Rogers' trial counsel "absolutely" did not satisfy the  
3 standard of practice in their investigation and presentation of Rogers' NGRI defense.  
4 See Testimony of Martin Wiener at Evidentiary Hearing, ECF No. 276, p. 239.

5       The Court finds that Rogers' trial counsel's performance, with respect to their  
6 investigation and presentation of Rogers' NGRI defense, fell below an objective  
7 standard of reasonableness. There was ample evidence that Rogers had acted in a  
8 bizarre manner both before and after the crimes, and it was obvious that an NGRI  
9 defense was called for, but, in this Court's view, because of trial counsel's inept  
10 presentation of the NGRI defense, there was no chance of that defense prevailing.

11 The Court finds that there is a reasonable probability that, but for counsel's objectively  
12 unreasonable investigation and presentation of Rogers' NGRI defense, Rogers would  
13 have been found not guilty by reason of insanity. Trial counsel's blatant mishandling of  
14 the NGRI defense deprived Rogers of a fair trial. The result of Rogers' trial, with regard  
15 to the jury's rejection of his NGRI defense, was not reliable.

16       Regarding Ground 5, then, the Court determines that Rogers' federal  
17 constitutional right to effective assistance of counsel was violated, and habeas corpus  
18 relief is warranted. The Court will grant Rogers habeas corpus relief with respect to  
19 Ground 5.

20 Ground 16

21       In the remaining part of Ground 16, Rogers claims that his federal constitutional  
22 rights were violated as a result of ineffective assistance of counsel because his trial  
23 counsel failed to object to the trial court's instruction to the jury that, if found guilty by

1 reason of insanity, Rogers would be committed to a state hospital until “regularly  
2 discharged therefrom in accordance with state law.” See Second Amended Petition  
3 (ECF No. 77), p. 189.

4 This claim was dismissed as procedurally defaulted on March 24, 2008 (ECF No.  
5 108) and is one of the claims remanded by the Court of Appeals for reconsideration in  
6 light of *Martinez*. See *Rogers v. McDaniel*, 793 F.3d 1036, 1045 (2015).

7 The jury instruction at issue here was the following:

8 Where on a trial a defense of insanity is interposed by the  
9 defendant and he is acquitted by reason of that defense, the finding of the  
10 jury shall have the same force and effect as if he were regularly adjudged  
11 insane as now provided by law, and the judge thereupon shall forthwith  
12 order that the defendant be committed to the custody of the Administrator  
of the Mental Hygiene and Mental Retardation Division of the Department  
of Human Resources until he is regularly discharged therefrom in  
accordance with law.

13 Jury Instructions, ECF No. 77-6, p. 854. Rogers asserts, as follows, that this jury  
14 instruction was erroneous:

15 The instruction misled the jury because it informed them that, were  
16 they to find him not guilty by reason of insanity, he could easily be  
17 released as a matter of course. It is a violation of state and federal due  
18 process to allow a jury to consider and be informed of the consequences  
19 of their verdict, which is an open invitation to decide the issue on matters  
not adduced as evidence at trial. Moreover, this erroneous instruction  
invited the jury to reject Mr. Rogers’ defense because of their fear he  
might be allowed release ....

20 Second Amended Petition (ECF No. 77), p. 189. Rogers asserts that his trial counsel  
21 was ineffective for failing to object to this jury instruction. *Id.*

22 Respondents argue that this claim is procedurally defaulted, that Rogers does  
23 not show cause and prejudice under *Martinez* to overcome the procedural default, and

1 that the claim should be dismissed on that ground. See Answer (ECF No. 203), pp. 39-  
2 40. Rogers responds that he can overcome the procedural default, under *Martinez*, by  
3 showing ineffective assistance of his first state post-conviction counsel in not asserting  
4 the claim. See Reply (ECF No. 205), pp. 28-29. The issues raised by the parties'  
5 arguments, then, distill down to the question whether this claim of ineffective assistance  
6 of trial counsel has any merit. The Court determines that it does not.

7 Nevada courts have long approved of jury instructions like the one at issue here.  
8 See *Blake v. State*, 121 Nev. 779, 792-93, 121 P.3d 567, 575-76 (2005) (trial court  
9 erred in refusing to instruct jury regarding consequences of verdict of not guilty by  
10 reason of insanity, but reversal not warranted); *Harris v. State*, 106 Nev. 667, 670, 799  
11 P.2d 1104, 1106 (1990) (trial court committed reversible error in refusing to instruct jury  
12 regarding consequences of verdict of not guilty by reason of insanity); *Bean v. State*, 81  
13 Nev. 25, 33-34, 398 P.2d 251, 256-57 (1965) (trial court erred in refusing to instruct jury  
14 regarding consequences of verdict of not guilty by reason of insanity, but reversal not  
15 warranted); *Kuk v. State*, 80 Nev. 291, 299-300, 392 P.2d 630, 634-35 (1964) ("The  
16 purpose of the instruction is to inform the jurors that if they find the defendant insane,  
17 and acquit, he will not walk out of the courtroom a free man, but will be confined for  
18 medical treatment."). In view of the Nevada precedent – *Bean* and *Kuk* were decided  
19 long before Rogers' trial -- there was no basis under state law for Rogers' trial counsel  
20 to object to the jury instruction, and there was no reason for Rogers' first state post-  
21 conviction counsel to raise this issue.

22 In his Reply, Rogers recognizes the Nevada Supreme Court's holding in *Kuk*, but  
23 he argues that "[t]hat opinion did not, however, consider the impact of the instruction on

1 a defendant's right to a fair trial under the federal constitution," and that "trial counsel  
2 have an obligation to argue for changes in the law when existing law is prejudicial to  
3 their client." Reply (ECF No. 205), p. 34. Rogers does not, however, cite any authority  
4 supporting the contention that the subject instruction violated Rogers' federal  
5 constitutional right to due process of law, and he does not articulate any reason to  
6 believe that an argument for a change in the Nevada law would have been successful.

7 Rogers' trial counsel was not ineffective for not objecting to the jury instruction at  
8 issue here, and Rogers' first state post-conviction counsel was not ineffective for not  
9 asserting this claim. The claim of ineffective assistance of trial counsel in Ground 16 is  
10 procedurally defaulted, and Rogers has not shown cause and prejudice to overcome the  
11 procedural default. The claim of ineffective assistance of trial counsel in Ground 16 will  
12 be denied on that ground.

### 13 Ground 18

14 In the remaining part of Ground 18, Rogers claims that his federal constitutional  
15 rights were violated as a result of ineffective assistance of counsel because his trial  
16 counsel failed to object to the trial court's comments to the jury minimizing the State's  
17 burden of proof. See Second Amended Petition (ECF No. 77), pp. 191-94.

18 Like the remaining part of Ground 16, this claim was dismissed by this Court as  
19 procedurally defaulted on March 24, 2008 (ECF No. 108), and it is one of the claims  
20 remanded by the Court of Appeals for reconsideration in light of *Martinez*. See *Rogers*  
21 *v. McDaniel*, 793 F.3d 1036, 1045 (2015).

22 Rogers alleges that Judge Llewellyn Young, who presided over the first seven  
23 days of jury selection but who was replaced, because of illness, for the remainder of the

1 trial by Judge Robert Legakes, made comments to the prospective jurors during jury  
2 selection minimizing the State's burden of proof. See Second Amended Petition (ECF  
3 No. 77), pp. 191-94. Rogers points to the following explanation of the State's burden of  
4 proof, given to the prospective jurors by Judge Young during jury voir dire (*see id.*):

5           Another concept, the State has the burden of proving the case  
6 beyond a reasonable doubt. You will get more of that here a little later on  
7 reasonable doubt, but when you have a scale here like we have here in  
8 front of me, the -- they start out with the presumption of innocence and  
9 then the State has to put on evidence to overcome that presumption of  
10 innocence, and the scale -- if they put on enough evidence, why it weighs  
11 the scale down and if it's over here the presumption would come up  
12 (indicating), or beyond a reasonable doubt, then and only then could you  
13 find the defendant guilty.

14                           \*    \*    \*

15           Probable cause is a concept we use with grand jurors and in the  
16 justice court. This means is there any scintilla really of evidence. There  
17 just would be enough to maybe think that a crime had been committed  
18 and perhaps the defendant had committed the crime.

19           On a scale from zero to ten this would probably be down about one.  
20 It doesn't take much evidence. It's really not much evidence at all, but  
21 somebody thinks something's happened so they decide they want it to  
22 come to the district court for a trial.

23                           \*    \*    \*

24           Now we have beyond a reasonable doubt. That's what -- that's the  
25 scale we have in criminal matters.

26           That is more evidence than preponderance but it isn't clear up to  
27 ten. It's someplace between 50 percent [and] 100 percent. It's a judgment  
28 call that you, the jury, has to make, and when the State has evidence that  
29 triggers the balance here or the lever over here on this side to come up to  
30 beyond a reasonable doubt and then that's when you would bring in a  
31 guilty verdict.

32           Now, if the State does not bring the evidence up to beyond a  
33 reasonable doubt, then you would still bring in a not guilty verdict.

1 Now, as I say, this is a judgment call but I hope it's been more fully  
2 explained. I am just giving you some broad concepts here now.

3 \* \* \*

4 There again, I told you the differences between the trials. The  
5 grand jury is probable cause; that's about one on the scale of evidence,  
6 zero to ten. In a civil or criminal trial it is 50 percent. That's preponderance  
7 of the evidence. And then again in the criminal case, why, it's beyond a  
8 reasonable doubt which is someplace between 50 percent and 100  
9 percent but not quite 100 percent.

10 \* \* \*

11 If I were to instruct you a reasonable doubt is one based on reason;  
12 it is not a mere possible doubt, but is such a doubt as would govern or  
13 control a person in the more weighty affairs of life, and if the minds of the  
14 jurors after the entire comparison and consideration of all the evidence are  
15 in such condition that they can say they feel an abiding conviction of the  
16 truth of the charge there is not a reasonable doubt.

17 Doubt, to be reasonable, must be actual and substantial, not mere  
18 possibility or speculation.

19 Transcript of Trial, October 20, 1981, ECF No. 136-2, pp. 22-32. Judge Young  
20 reiterated this explanation of the burden of proof, in essentially these same terms,  
21 several times, as individual prospective jurors were called upon to be examined.  
22 See, e.g., Transcript of Trial, October 28, 1981, ECF No. 137-2, p. 112; Transcript  
23 of Trial, October 28, 1981, ECF No. 137-3, pp. 14, 195; Transcript of Trial,  
October 29, 1981, ECF No. 137-4, pp. 4-5, 42, 59, 73, 108, 113-14; Transcript of Trial,  
October 29, 1981, ECF No. 137-4, pp. 3-4.

20 Respondents concede that it was error under Nevada law for Judge Young to  
21 attempt in this manner to explain the State's burden of proof. See Answer (ECF No.  
22 203), p. 42. However, Respondents argue – and this Court agrees – that there was not  
23 ineffective assistance of trial counsel, under *Strickland*, on account of trial counsel's

1 failure to object, because, under the circumstances, there is not a reasonable probability  
2 that, but for counsel's failure to object, the result of the trial would have been different.

3 *See Strickland*, 466 U.S. at 688, 694.

4 During jury voir dire, along with his improper commentary, Judge Young stated to  
5 the jury the proper jury instruction regarding the burden of proof. See Transcript of Trial,  
6 October 20, 1981, ECF No. 136-2, p. 32 ("If I were to instruct you ...."). And,  
7 most importantly, at the end of the trial, just before the jury went out to deliberate,  
8 Judge Legakes properly instructed the jurors as follows:

9 A reasonable doubt is one based on reason. It is not mere possible  
10 doubt, but is such a doubt as would govern or control a person in the more  
11 weighty affairs of life. If the minds of the jurors, after the entire comparison  
12 and consideration of all the evidence, are in such a condition that they can  
say they feel an abiding conviction of the truth of the charge, there is not a  
reasonable doubt. Doubt to be reasonable must be actual and substantial,  
not mere possibility or speculation.

13 Jury Instructions, ECF No. 77-6, p. 835. Judge Young's improper comments during jury  
14 voir dire were not so erroneous, and they were not such as to have such an impact, as  
15 to deprive Rogers of a fair trial or render the result of his trial unreliable. *See Strickland*,  
16 466 U.S. at 687.

17 Rogers first state post-conviction counsel was not ineffective for not asserting  
18 this claim. The claim of ineffective assistance of trial counsel in Ground 18 is  
19 procedurally defaulted, and Rogers has not shown cause and prejudice to overcome the  
20 procedural default. The claim of ineffective assistance of trial counsel in Ground 18 will  
21 be denied on that ground.

1 Certificate of Appealability

2 The standard for the issuance of a certificate of appealability requires a  
3 “substantial showing of the denial of a constitutional right.” 28 U.S.C. §2253(c). The  
4 Supreme Court has interpreted 28 U.S.C. § 2253(c) as follows:

5 Where a district court has rejected the constitutional claims on the  
6 merits, the showing required to satisfy § 2253(c) is straightforward: The  
7 petitioner must demonstrate that reasonable jurists would find the district  
8 court’s assessment of the constitutional claims debatable or wrong. The  
9 issue becomes somewhat more complicated where, as here, the district  
10 court dismisses the petition based on procedural grounds. We hold as  
11 follows: When the district court denies a habeas petition on procedural  
12 grounds without reaching the prisoner’s underlying constitutional claim, a  
13 COA should issue when the prisoner shows, at least, that jurists of reason  
14 would find it debatable whether the petition states a valid claim of the  
15 denial of a constitutional right and that jurists of reason would find it  
16 debatable whether the district court was correct in its procedural ruling.

17 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); see also *James v. Giles*, 221 F.3d 1074,  
18 1077-79 (9th Cir. 2000). The Court finds that, with respect to the claims in Grounds 16  
19 and 18 addressed in this order, and the other remanded claims on which the Court  
20 denies Rogers relief, applying the standard articulated in *Slack*, a certificate of  
21 appealability is unwarranted.

22 Conclusion

23 **IT IS THEREFORE ORDERED** that upon reconsideration of the claims in  
24 Petitioner’s Second Amended Petition for Writ of Habeas Corpus (ECF No. 73)  
25 remanded to this Court by the Ninth Circuit Court of Appeals, the Court grants Petitioner  
26 habeas corpus relief with respect to Ground 5. The Court denies Petitioner relief with  
27 respect to the other remanded claims.

1       **IT IS FURTHER ORDERED** that Respondents shall either (1) within 90 days  
2 from the date of this order, vacate Petitioner's judgment of conviction and adjudge him  
3 not guilty by reason of insanity, and adjust his custody accordingly, consistent with  
4 Nevada law, or (2) within 90 days from the date of this order, file a notice of the State's  
5 intent to grant Petitioner a new trial, and, within 180 days from the date of this order,  
6 commence jury selection in the new trial.

7       **IT IS FURTHER ORDERED** that Petitioner is denied a certificate of appealability  
8 with respect to the claims on which he is not granted habeas corpus relief.

9       **IT IS FURTHER ORDERED** that the judgment in this action will be stayed  
10 pending the conclusion of any appellate or certiorari review in the Ninth Circuit Court of  
11 Appeals or the United States Supreme Court, or the expiration of the time for seeking  
12 such appellate or certiorari review, whichever occurs later.

13       **IT IS FURTHER ORDERED** that the Clerk of the Court is directed to enter an  
14 Amended Judgment in this action, as follows:

15               IT IS ORDERED AND ADJUDGED that Petitioner's Second  
16 Amended Petition for Writ of Habeas Corpus (ECF No. 77) is GRANTED  
17 IN PART AND DENIED IN PART. The Second Amended Petition for Writ  
18 of Habeas Corpus is GRANTED with respect to Grounds 5, 20, 21, and  
19 23, and the Second Amended Petition for Writ of Habeas Corpus is  
20 DENIED with respect to all other claims.

21               IT IS FURTHER ORDERED AND ADJUDGED that Respondents  
22 shall either (1) within 90 days from the date of this order, vacate  
23 Petitioner's judgment of conviction and adjudge him not guilty by reason of  
insanity, and adjust his custody accordingly, consistent with Nevada law,  
or (2) within 90 days from the date of this order, file a notice of the State's  
intent to grant Petitioner a new trial, and, within 180 days from the date of  
this order, commence jury selection in the new trial.

1 IT IS FURTHER ORDERED AND ADJUDGED that petitioner is  
2 denied a certificate of appealability with respect to the claims on which he  
is not granted habeas corpus relief.

3 IT IS FURTHER ORDERED AND ADJUDGED that this judgment  
4 will be stayed pending the conclusion of any appellate or certiorari review  
5 in the Ninth Circuit Court of Appeals or the United States Supreme Court,  
6 or the expiration of the time for seeking such appellate or certiorari review,  
whichever occurs later.

7 DATED THIS 23 day of September, 2019.

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11 \_\_\_\_\_  
12 GLORIA M. NAVARRO,  
13 UNITED STATES DISTRICT JUDGE  
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